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No. 83-1414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Petitioner,

v.

LAURENCE G. RUSSELL, WILLIAM L. HANNA, AND EDDIE D. LANGWELL,
Respondents.

REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner in the above-entitled case, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes [hereinafter, "BRAC"], submits the following reply to the Brief of Respondents Laurence G. Russell, *et al.*, in opposition to the petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above case.

A. The Claim Asserted In Respondents' Brief That Petitioner BRAC Lacks Standing To Seek Review Of The Judgment Of The Court Of Appeals For The Fifth Circuit Is Factually And Legally In Error

Respondents' brief is factually in error with respect to several matters relating to its argument that Petitioner lacks standing to seek review by this Court of the judgment of the United States Court of Appeals for the Fifth Circuit here involved.

(a) Respondent's brief (at 3) states that the first cause of action in its Complaint before the District Court was directed solely at the National Mediation Board [hereinafter, "NMB" or "Board"]. However, paragraph 17 of the Complaint (Petition, Appendix F, at 53a) realleges each of the claims set forth in paragraphs 1 through 16 of the first cause of action of the Complaint as a part of its second cause of action agaist BRAC. Paragraph 17 reads as follows:

> "17. Paragraph 1 through 16 of the Complaint are realleged as if fully set forth herein."

Moreover, paragraph B of the Complaint (Petition, Appendix F, at 53a, 54a) prays that the Court mandamus the Board to conduct an election and certify the plaintiff (Respondent) as the representative of the class or craft of Santa Fe Police Officers to the Petitioner BRAC. There is no reference in the prayer for relief to either the first or second cause of action.

(b) The Respondents' brief states (at 4) that the District Court's order granting the NMB's motion for summary judgment dismissed only the first cause of action and that its order granting BRAC's motion for summary judgment dismissed only the second cause of action. This statement is incorrect.

The District Court's order granting the NMB motion is reproduced as Appendix B to the Petition (at 30a). That order read as follows:

> "It is ORDERED that the above cause is DISMISSED on the merits as to Defendant National Mediation Board only."

There is no reference to the first cause of action contained in such order. The above cause that is dismissed is *Laurence G. Russell, et al.* Likewise, the District Court subsequently granted BRAC summary judgment on the complaint. (Petition, Appendix A, at 6a, n.2). That motion covered all issues in the complaint since all were alleged against BRAC.

(c) The Respondents' brief (at 4) further states that Respondents filed a limited appeal restricted solely to the District Court's dismissal of the first cause of action. That statement is also incorrect. That notice of appeal (Petition, Appendix J, at 66a) appeals "from the March 17, 1982, order granting defendant National Mediation Board's motion for summary judgment on the grounds of lack of subject-matter jurisdiction." That order dismissed, as set forth above, "the above cause," *i.e.*, *Laurence G. Russell, et al.* v. *National Mediation Board, et al.* as to the Board.

(d) Respondents' brief states (at 8-9) that "although respondents repeatedly raised the 'standing issue' with the Court of Appeals, it was never formally addressed by that court and petitioner apparently enjoyed full party status." This statement is incorrect.

(e) Respondents' brief to the Court of Appeals, as Appellants, dated November 12, 1982, raised no issue with respect to the standing of BRAC. Indeed, the "Certificate of Interested Persons," page (i) of that brief, required by the Court of Appeals rules, certified "that the

following listed persons have an interest in the outcome of this case." Those listed included "Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, AFL-CIO." The cover page of the Respondents' brief to the Court of Appeals lists "The Atchison, Topeka and Santa Fe Railway Company" and "BRAC" as "defendants Below and Parties in Interest."

BRAC's brief to the Court of Appeals, dated January 14, 1983, was entitled "Brief For Appellee Brotherhood Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes." It listed the NMB and BRAC as "Defendants-Appellees."

No question of BRAC's standing was raised in the Court of Appeals by Respondents until BRAC filed a motion with that Court, dated October 3, 1983, for an extension of time in which to file a petition for rehearing and a suggestion for rehearing *en banc* of the Court's decision of September 22, 1983 which listed "Defendants-Appellees" as "National Mediation Board, *et al.*" Respondents challenged the extension on the ground that BRAC had no standing because it was only a party in the District Court to the second cause of action and Respondents did not appeal the District Court's grant of summary judgment to BRAC on that cause. The Court of Appeals granted the motion for an extension of time on November 7, 1983, in an order which listed BRAC as "Appellee, Brotherhood of Railway and Airline Clerks."[1]

The petition for rehearing was denied by the Court of Appeals on November 28, 1983. On a subsequent BRAC motion for a stay of mandate, the Respondents again

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[1] In BRAC's Petition (at 8, n.4), this motion and the Respondents' objections thereto were set forth.

challenged BRAC's standing. That motion was denied in a two-page order on grounds which did not mention Respondents' "standing" claim.

Thus, in summary:

(1) The allegations of the Complaint ran against BRAC, as well as the National Mediation Board;

(2) BRAC was granted summary judgment by the District Court with respect to the allegation against it in the Complaint;

(3) Although Respondents for some tactical reason did not appeal the order granting BRAC summary judgment, the Court of Appeals treated BRAC as a "defendant-appellee" and Respondents listed BRAC as a "Defendant Below and a Party in Interest";

(4) Respondents raised no issue before the Court of Appeals with respect to BRAC's standing until almost a month after that Court had rendered its decision of September 22, 1983.

Respondents' claim as to BRAC's standing is without merit. BRAC is clearly a proper party within the meaning of Rule 19.6 of this Court affected by the judgment of the Court of Appeals.

B. The Failure Of Respondents' Brief To Address Issues Raised By Petitioner

Respondents' brief never addresses itself to the reasons set forth in the Petition for review by this Court of the Court of Appeals judgment.

Respondents' brief seeks (at 8) to write-off the NMB order involved as "but another example of the NMB improperly encouraging collective representation," cit-

ing as its basis, the dissent of Justice Stewart in *BRAC* v. *Association of Non-Contract Employees*, 380 U.S. 650 (1965). The brief thus ignores the fact that the NMB order (Appendix E-1 to the Petition) found that Mr. Russell's application failed to meet the requirements of a "representative" under the Railway Labor Act. Moreover, this Court in *Detroit & Toledo S.R.R. Co.* v. *United Transportation Union*, 396 U.S. 142 (1969) specifically found that the Railway Labor Act was passed to encourage collective bargaining. On this point, the Court declared:

> "The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Id.* at 331.

This Court has also found, *inter alia*, that (a) it was the purpose of Congress in adopting the Railway Labor Act to bring about stable relationships between labor and management in an important national industry, *Brotherhood of Railroad Trainmen* v. *Chicago River & I.R. Co.*, 353 U.S. 30 (1957) and (b) that the provisions of the statute are aimed at settlement of labor disputes by inducing collective bargaining with representatives of employees. *Virginia R. Co.* v. *System Federation*, 300 U.S. 515 (1937).

Consequently, when the Board interprets that statute as requiring an applicant for designation as a Section 2, Ninth representative to have an intent to carry out the duties imposed on a representative by the statute, which include the duty of settling of disputes through collective representation in conference (*see, BRAC* v. *Association of Non-Contract Employes, supra*), the Board is only harkening to the declarations of this Court as to statutory purpose.

Finally, Respondents' brief shows that even using Respondents' figures, there are a substantial number of employees in the craft or class involved of Santa Fe employees, who want representation in collective bargaining and grievance handling. If the Court of Appeals' decision is correct, and Mr. Russell becomes their "representative" under the Railway Labor Act, what becomes of the judicially declared and imposed duty of fair representation, imposing the duty upon a representative to properly act for the interests of every member of the craft or class he is designated to represent? *See, Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949).

CONCLUSION

It is submitted that the Respondents' Brief in Opposition further demonstrates the need for this Court to review the judgment of the Court of Appeals. Although that brief states that the Court below decided the issues correctly, it is unable to answer any of the criticism levelled against that decision by the Petition or to support the statutory interpretation upon which that decision is based. Instead, the brief wanders off into an attack on the National Mediation Board for interpreting the Railway Labor Act as encouraging collective bargaining, which

this Court has specifically found is the principal statutory purpose.

Respectfully submitted,

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